IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 6, 2002 Session

STANLEY A. GUNTER v. LABORATORY CORPORATION OF AMERICA, d/b/a LABCORP, ET AL.

Appeal from the Circuit Court for Davidson County
No. 01-C-2890 Thomas W. Brothers, Circuit Court Judge

No. M2002-00600-COA-R3-CV - Filed October 3, 2002

This appeal rises from the action of the Juvenile Court of Montgomery County which granted a Default Judgment in 1998 for retroactive and current child support against the Plaintiff. Plaintiff attempted to have the support obligation set aside in the Juvenile Court but following a submission of paternity blood tests, one of which was conducted by the Defendant, the Plaintiff was denied further relief. The Plaintiff filed suit in the Circuit Court of Davidson County alleging that the paternity tests were negligently performed which resulted in erroneous results which in turn caused him to be unable to set aside the judgment of the Juvenile Court. The Circuit Court, upon motion, dismissed the Defendant testing laboratory, holding that the case was "governed" by the one (1) year statutes of limitations for medical malpractice and injury to the person. Plaintiff appealed the Circuit Court's ruling, arguing that this was not an injury to the person but to personal property and in the alternative a breach of contract action. Finally, the Plaintiff alleged that even if this were an action for personal injury, the one (1) year statute had not run. We agree with the Plaintiff that this is not a medical malpractice action or an action for personal injury, but rather an action for injury to personal property which is controlled by the three (3) year statute set forth at T.C.A. § 28-3-105. We therefore reverse the Circuit Court and remand the case for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

THOMAS W. GRAHAM, SP. J., delivered the opinion of the court, in which BEN H. CANTRELL and WILLIAM B. CAIN, joined.

August C. Winter, Brentwood, Tennessee, for the appellant, Stanley A. Gunter.

William E. Godbold, III, and Cherie D. Jewell, Chattanooga, Tennessee, and Thomas J. Dement, III, Nashville, Tennessee, for the appellee, LabCorp.

OPINION

Background

On September 21, 2001, Plaintiff, Stanley A. Gunter, filed an action in the Circuit Court of Davidson County against Defendant, Laboratory Corporation of America, d/b/a LabCorp, and another testing laboratory.[1] The Complaint alleged that a Default Judgment and an Order of Support were entered against Mr. Gunter in August of 1998 in the Juvenile Court of Montgomery County requiring the Plaintiff to pay current and retroactive child support for Jeremy Clinard. In an effort to stay the Order, the Plaintiff submitted blood samples for testing to the Co-Defendant, Laboratory Investments, Inc. Laboratory Investments, Inc. then analyzed the blood samples and issued the results of its paternity test on September 25, 1998, at which time it was reported that there was a 99.99% probability that the Plaintiff was the biological father of Jeremy Clinard. In October of 1998, at the request of the Plaintiff, the Juvenile Court ordered a stay pending the results of a second paternity test to be paid for by the Plaintiff. The second blood test was performed by the Defendant which announced its results on May 25, 1999, indicating a 99.94% probability that the Plaintiff was the father of Jeremy Clinard. Thereafter, the Complaint alleges Plaintiff's request for a third paternity test was denied by the Juvenile Court. Plaintiff's Complaint alleges that "as a direct and proximate result of the Defendant, LabCorp's, negligence in failing to provide an accurate statement of the probability of paternity, the Default Judgment against Mr. Gunter has not been set aside ..." The Plaintiff further alleged in his Complaint that LabCorp's failure to perform "appropriate testing" also constituted a breach of contract. In response to the Complaint, the Defendant filed a Rule 12.02(6) Motion to Dismiss for failure to state a claim upon which relief could be granted, same being time barred by the expiration of the one year statute of limitations set forth at T.C.A. § 28-3-104. Thereafter, on February 15, 2002, the Circuit Court of Davidson County entered a Final Order of Dismissal as to Laboratory Corporation of America, d/b/a LabCorp, holding that the action was controlled by the one year statutes of limitations set forth at T.C.A. § 28-3-104 and T.C.A. § 29-26-116. The Final Order as to the Defendant was entered pursuant to Rule 54.02, and it is from this ruling that the Plaintiff now presents the issues to be determined by this Court.

Discussion

In holding that the Complaint should be dismissed, the Circuit Court found the action was "governed by" T.C.A. § 29-26-116, the one year medical malpractice statute of limitations. The pertinent portion of the aforesaid section states:

> " ... The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104. ..."
>
> T.C.A. § 29-26-116(a)(1)

Our first inquiry is to determine the applicability of the medical malpractice statute of limitations to an action alleging damage resulting from a negligently conducted paternity test. The

[1] Plaintiff later amended his Complaint to add Gary D. Niblack as a Defendant. Neither Mr. Niblack nor the other Defendant, Laboratory Investments, Inc., are parties to this appeal.

statute, T.C.A. § 29-26-116 was enacted as part of the Medical Malpractice Review Board and Claims Act of 1975. In 1985 the legislature decided to abolish the Medical Malpractice Review Board by repealing a number of the sections of the original act while leaving in place the statute of limitations and certain other parts of the act not dealing with the Board. (See Acts of 1985, Chapter 184, Section 4.) The aforesaid Act also repealed the definitions for "medical malpractice action" and the included term "health care provider." The repealed definitions provided in pertinent part as follows:

> (4) "Health care provider" includes but is not limited to physicians (including osteopaths), dentists, clinical psychologists, pharmacists, optometrists, podiatrists, registered nurses, physicians' assistants, chiropractors, physical therapists, nurse anesthetists, anesthetists, emergency medical technicians, hospitals, nursing homes and extended care facilities ..."
> (6) "Medical malpractice action" means an action for damages for personal injury or death as a result of any medical malpractice by a health care provider, whether based upon tort or contract law. <u>The term shall not include any action for damages as a result of negligence of a health care provider when medical care by such provider is not involved in such action.</u> ..."
>
> T.C.A. § 29-26-102(4)(6), Repealed by Acts of 1985, Ch. 184, § 4
> (Emphasis added.)

These repealed sections must be looked to in order to determine the legislative intent behind the passage of the unrepealed sections of the Act. See **Estate of Doe v. Vanderbilt University, Inc.**, 824 F.Supp. 746, 748 (M.D.Tenn. 1993) and **Burris v. Hospital Corporation of America**, 773 S.W.2d 932, 934 (Tenn. App. 1989). A critical limitation to the application of the medical malpractice one-year statute of limitations is the requirement that the alleged injury must result from negligent medical care. Our review of the pleadings finds no allegation or alleged fact which would support a holding that a paternity blood test for the purpose of establishing a child support obligation should be considered "medical care." We also have grave doubts that the allegations in this case would support a finding that the Defendant laboratory is even a "health care provider." However, since we have found the lack of medical care removes this case from the definition of a medical malpractice action, it is not necessary for us to resolve this additional question. In making this ruling, we are fully aware of the case of **Terry v. Niblack**, 979 S.W.2d 583 (Tenn. 1998) which applied this statute to paternity testing. However, the definition of medical malpractice action was not a contested issue in that case. The litigated issue was the date the cause of action arose. Id. at 587. Our Supreme Court has previously opined: "Every decision must be read with special reference to the questions involved ... and language used not ... decided therein is not binding as precedent." **Rush v. Chattanooga Dupont Employees Credit Union**, 358 S.W.2d 333, 336 (Tenn. 1962) See also **Shousha v. Matthews Drivurself Service, Inc.**, 358 S.W.2d 471, 473 (Tenn. 1962). We believe the reference to the applicability of the statute in **Terry** is dicta and not binding on our

inquiry. We hold this case is not a medical malpractice action and therefore, T.C.A. § 29-26-116 is not applicable.

Having found this action not within the ambit of the medical malpractice statute, we must now turn to the applicability of the remaining statute relied upon by the Trial Judge. In this regard T.C.A. § 28-3-104 states in pertinent part:

> ... The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (1) Actions for ... injuries to the person ...
>
> T.C.A. § 28-3-104(a)(1)

Plaintiff contends this is not an action for injuries to the person but rather an action for injuries to personal property covered by the three (3) year statute of limitations set forth in T.C.A. § 28-3-105 which states in pertinent part:

> ... The following actions shall be commenced within three (3) years from accrual of the cause of action:
>
> (1) Actions for injuries to personal or real property;
>
> ...
>
> T.C.A. § 28-3-105(1)

The Plaintiff also pleads, in the alternative, that this is a breach of contract case which is controlled by the six year statute of limitations found at T.C.A. § 28-3-109(a)(3). The Defendant says this is a tort action for injury to the person as found by the Trial Court.

The general principles for determining the applicable statute of limitations in a particular cause were addressed by our Supreme Court in the case of **Vance v. Schulder**, 547 S.W.2d 927, 931 (Tenn. 1977). **Vance** holds that the proper statute to be used is determined by looking to the gravamen of the Complaint. Id. at 931. We believe the gravamen of this case sounds in negligence and tort and not in an action on a contract. The issue is not whether the Defendant failed to test the blood or make a report, but rather whether it was negligent in the methods it used to determine the probability of paternity. The six (6) year contract statute of limitations, T.C.A. § 28-3-109, is, therefore, not applicable to this action.

The critical issue in this case is whether the injury suffered by the Plaintiff, i.e. a judgment for child support, is an injury to his person or his property. If the judgment is an injury to the person, the lower court was correct in applying the one-year statute and dismissing the action. On the other hand, if the judgment was an injury to personal property, the action is not time barred since it was filed within three years of the earliest possible date the cause of action could have accrued, the date the report was first published. Guidance for the determination of whether an action is for injury to the person or the person's property is provided by the case of **Brown v. Dunstan**, 409 S.W.2d 365 (Tenn. 1966). **Brown** simply holds that the phrase "injuries to the person" as contained in T.C.A. § 28-3-104(a)(1) means "actions brought for injuries resulting from invasions of rights that inhere in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law." Id. at 367. Examples of damage to the person would be actual physical injury to

the body, injury to reputation, and emotional injury. Likewise, injury to property is not limited to physical damage and may include economic loss and injury to the pocketbook. **Vance,** supra**,** at 932. We believe an erroneous money judgment for current and retroactive child support is an economic loss and an injury to the pocketbook which does not fit within the definition of injuries to the person as set forth in **Brown**. We therefore hold this action is an action for recovery for injuries to the Plaintiff's personal property which requires application of the three-year statute of limitations found in T.C.A. § 28-3-105. It follows, therefore, that the judgment of the Trial Court must be reversed, and this matter remanded to the Trial Court for further action not inconsistent with this opinion.[2]

THOMAS W. GRAHAM, SPECIAL JUDGE

[2] Since the complaint was filed well within three (3) years after the alleged erroneous results were first published, it is not necessary for us to address Plaintiff's arguments that the cause of action accrued on a date subsequent to publication.